

REMARKS

The present communication is responsive to the Final Office Action mailed September 18, 2008. Applicants filed a Notice of Appeal with a one-month extension of time on January 20, 2009. Pursuant to the Notice of Appeal filing, an Appeal Brief was due March 23, 2009. In lieu of filing an Appeal Brief, Applicants are filing the present Amendment to clarify the invention claimed. A three-month extension of time extending the period of reply from March 23, 2009 up to and including June 23, 2009 is submitted herewith along with a Request for Continued Examination.

Claims 1-8, 10-20 and 22 were rejected in the Action. Independent claims 1 and 22 are amended herein. No claims are added or cancelled herein. Therefore, claims 1-8, 10-20 and 22 remain pending in the Action. Applicants set forth remarks relating to the Action below.

The Examiner rejected claims 1-8, and 10-20 under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 6,478,800 to Fraser *et al.* ("*Fraser*") in view of U.S. Pat. No. 5,401,269 to Buttner-Janz *et al.* ("*Buttner-Janz*") and PCT Appln. No. WO 01/62191 to McGahan *et al.* ("*McGahan*"), and claim 22 under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 6,368,350 to Erickson *et al.* ("*Erickson*") in view of U.S. Pat. No. 6,174,311 to Branch *et al.* ("*Branch*").

As an initial matter, Applicants would like to thank the Examiner for the conducting the telephone interview regarding previously presented independent claims 1 and 22 and the references cited in the Action. During the interview, the undersigned reiterated the argument that none of the cited references disclose or suggest a lower surface of a first baseplate being held against an upper surface of a spacer of a manipulation tool in order to lordodically angle the first

baseplate with respect to a second baseplate. Nonetheless, Applicants have amended claims 1 and 22 herein to more clearly define the invention claimed. Specifically, the prior art does not disclose or suggest a manipulation tool further including a spacer protruding outwardly from an angled distal surface of the manipulation tool, wherein the spacer has an upper angled surface and a lower angled surface.

In the Action, with respect to independent claim 1, the Examiner asserted that *Fraser*, in FIG. 4, shows an implant with upper and lower baseplates having perimeters. The Examiner further asserted that *Fraser* shows, in FIG. 12, a tool with a corresponding distal surface 106 and a plurality of spacers or projections protruding outwardly from the distal surface to thus form a recessed engaging surface. The Examiner relied upon *Buttner-Janz* to supplement the lack of disclosure in *Fraser* of an articulatable spinal implant and relied upon *McGahan* to supplement the lack of disclosure in *Fraser* of a spinal implant with angled perimeter surfaces and an insertion tool with correspondingly angled distal end.

Independent claim 1 has been amended to recite, "wherein the first baseplate is lordodically angled with respect to the second baseplate as the lower surface of the first baseplate is held against the upper angled surface of the spacer." Applicants respectfully assert that independent claim 1 is unobvious over *Fraser* in view of *Buttner-Janz* and *McGahan* because even the combination of these references fails to meet the limitations of that claim. Moreover, there is no reason to combine these references in the manner the Examiner asserted. The Examiner refers to a plurality of spacers or projections shown on pusher block 18 in FIG. 12 of *Fraser*, but such are located on the outside perimeter of distal surface 106 of pusher

block 18 and therefore cannot lordodically angle a first baseplate with respect to a second baseplate in the manner claimed in independent claim 1. Further, currently pending independent claim 1 recites "the manipulation tool further including a spacer protruding outwardly from the angled distal surface, the spacer having an upper angled surface and a lower angled surface, wherein the first baseplate is lordodically angled with respect to the second baseplate as the lower surface of the first baseplate is held against the upper angled surface of the spacer." The spacers or projections that the Examiner refers to in *Fraser* are not and could not be used to keep a first baseplate lordodically angled with respect to a second baseplate as a lower surface of the first baseplate is held against an upper surface of the spacer. Since all the Examiner uses *Buttner-Janz* for is to teach an articulatable implant having first and second baseplates, the implant having a slot on the outer surface capable of receiving a tool, and *McGahan* to teach the spinal implant 10 with angled perimeter surfaces having a central flat surface 22 flanked by two flat corner perimeter surfaces 18, 26 that correspond to the angle distal end of the tool having central surface 128 and two flat flanked surfaces 126, 130 to engage the implant, there is a lack of teaching of certain limitations of claim 1.

Further, the manipulation tool in *McGahan* is not used to engage an implant having first and second baseplates mounted to one another such that the first and second baseplates are articulatable relative to one another. In contrast, the manipulation tool in *McGahan* is used to engage and/or manipulate a non-articulatable implant. The Examiner is utilizing the manipulation tool of *McGahan* to teach the inclusion of angled surfaces on the distal end of the manipulation tool of *Fraser*,

which is also a manipulation tool used to engage and/or manipulate a non-articulatable implant. For the foregoing reasons, amended independent claim 1 is unobvious over *Fraser* in view of *Buttner-Janz* and *McGahan* alone. Simply put, one of ordinary skill in the art would not have combined those references, and even if they were combined, one would not arrive at the present invention. Claims 2-20 are unobvious and should also be in condition for allowance, *inter alia*, from their dependence from claim 1. A dependent claim is necessarily narrower than the claim from which it depends.

Independent claim 22 has been amended to recite, "the manipulation tool further including a spacer protruding outwardly from the angled distal surface, the spacer having an upper angled surface and a lower angled surface, wherein the first baseplate is lordodically angled with respect to the second baseplate along a second rotational axis perpendicular to the first rotational axis as the lower surface of the first baseplate is held against the upper angled surface of the spacer." Applicants respectfully assert a *prima facie* case of obviousness cannot be made with the cited references, namely *Erickson* in view of *Branch*.

The angled distal surface of the manipulation tool that corresponds to the angled perimeter of the first and second baseplates of the present invention is structured to prevent rotation of the baseplates with respect to the manipulation tool along a first rotational axis. The spacer protruding outwardly from the angled distal surface of the manipulation tool when engaged to the first and second baseplates is structured to prevent rotation of the baseplates with respect to the manipulation tool during insertion along a second rotational axis perpendicular to the first rotational axis. Applicants respectfully assert that *Erickson* and *Branch* do not teach these

limitations. Moreover, Applicants further assert that *Erickson* and *Branch* also do not teach a manipulation tool further including a spacer protruding outwardly from the angled distal surface, the spacer having an upper angled surface and an lower angled surface. Therefore, amended independent claim 22 is unobvious and should be in condition for allowance.

Finally, Applicants refer the Examiner to U.S. Pat. No. 6,821,298 to Jackson ("*Jackson*") which is cited in an information disclosure statement submitted herewith. This reference has been cited by the Examiner in a related case. *Jackson* discloses an intervertebral fusion cage 301 having upper and lower walls 310, 311 coupled at rear wall 312. A bolt 304 is sized to be operably received first by an expansion cap bore 350 of expansion cap 303 and then through a matingly threaded rear wall bore 322. As described in the specification of *Jackson*, the expansion cap 303 is generally rectangular when viewed from the front, and includes a front face 340 perpendicularly joined with generally horizontal top and bottom walls 341 and 342 and planar side walls 343. After fusion cage 301 is implanted in an intervertebral disc space, bolt 304 and expansion cap 303 are used to expand the fusion cage such that adjacent vertebrae have a predetermined angle relative to each other. As clearly shown in Fig. 22, top and bottom walls 341 and 342 (which the Examiner has referred to as a spacer protruding outwardly from an angled distal surface of the manipulation tool in the related case) are flat, not angled. Thus, the Examiner should not utilize *Jackson* in rejecting the currently pending claims, whether in combination with the above-discussed references or not.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is

respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: June 23, 2009

Respectfully submitted,

By 

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